STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2006
V	No. 257516 Wayne Circuit Court
THOMAS FRANKLIN LOCKHART, Defendant-Appellant.	LC No. 04-005039-01

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for two counts of assault with a dangerous weapon ("felonious assault"), MCL 750.82. Defendant was sentenced to one year in the Wayne County Jail and three years' probation. We affirm.

Defendant first argues that the trial court's verdict was against the great weight of the evidence. We disagree.

A court may grant a new trial if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the evidence. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon*, *supra* at 627. If the evidence conflicts, the issue of credibility should be left for the trier of fact. MCR 2.613(C); *Lemmon*, *supra* at 642-643.

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

The elements of self defense are: (1) the defendant honestly and reasonably believed that he was in danger; (2) the degree of danger which he feared was serious bodily harm or death; (3) the action taken by the defendant appeared at the time to be immediately necessary; and (4) the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant had done all that was reasonably possible to avoid using force by retreating, if retreat was safe. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990).

Here, defendant was found guilty of two counts of felonious assault; one count for his attack against Hope Kunkle, and one count for his attack against Raymond Kunkle. The Kunkles own a bar, and were leaving one night when they found defendant smoking a joint in a doorway next to the bar entrance. Raymond told defendant he could not do so. Hope then flicked the joint out of defendant's hand. Hope and Raymond both testified that, at this point, defendant ran and grabbed a four to five foot long, galvanized, gray fence post that was sticking out of a trash container. He started chasing Raymond with the fence post, holding and swinging it like a baseball bat. Raymond tried to run backwards and fell. Hope tried to grab the fence post, but could not get close enough. Defendant saw Hope, turned and hit her, while her arms were up, on the arm and corner of her eye. After defendant hit Hope, the fence post fell. Hope ran over to the fence post and stood on it, to prevent defendant from picking it up again. Hope testified that she was "frightened" and "terrified." Defendant hit Hope, knocked her down onto the ground and punched her.

Defendant and his friend, Billy Whalen, testified to a different version of the events. Defendant testified that someone came up to him and stated, "I thought you were told to leave." Defendant then tried to explain that he just wanted to get his coat when he was "sucker punched." After this happened, a man known as "Shorty" and Whalen began to fight. Defendant was then attacked by a "bunch" of people, "more than [he] could fight off." The group included Hope, Raymond, Shorty, the bartender, and an unknown number of unidentified people. Whalen testified in a similar manner, stating, "As I was rolling [a cigarette], a guy came out of the bar, started sucker punching Tommie." Whalen further testified that he got into a fight with the man he pulled off defendant, and that he did not see a pipe, at any time, during the fight. According to Whalen, five or six people, both men and women, were beating up defendant in the middle of the street.

In its ruling, the trial court stated, "The Court finds that Mrs. Kunkle's testimony is true and believable and it finds her to be a very credible witness." The trial court further stated:

> I find that her testimony on the stand to be believable and credible. And that is, [Hope] went up behind [defendant] to prevent [him from hitting Raymond], because that's what she was doing and that [defendant] turned and gave her a whack, just for good measure, and that's what he did. Now, that accounts for both the extreme bruise on the arm, which runs from just above the elbow to the middle or higher, almost to the top of the bicep.

Additionally, the trial court stated:

> I don't believe Mr. Whalen's version, nor Mr. Lockhart's version of the facts. . . . I believe the Kunkle's testimony. And I don't believe [defendant's or Whalen's] testimony that he was the victim of an assault by Mr. Kunkle or Mrs. Kunkle or Shorty.

As noted above, this Court should defer to the trial court for determinations of credibility. MCR 2.613(C); *Lemmon, supra* at 642-643. Defendant's and Whalen's version of the fight

differed drastically from Hope's and Raymond's version of the fight. When the evidence conflicts, the issue of credibility should be left for the trier of fact. MCR 2.613(C); *Lemmon, supra* at 642-643. Here, the trial court found Hope and Raymond to be credible, and found defendant and Whalen not to be credible.

Hope's and Raymond's version of events provide evidence beyond reasonable doubt that defendant committed an assault against both Hope and Raymond, with the fence post, a deadly weapon, and that he intended to place them in fear of the an immediate battery. Therefore, his convictions for two counts of felonious assault are not against the great weight of the evidence.

Next, defendant argues that he was deprived the effective assistance of counsel because his defense counsel failed to produce evidence that Hope told Billy Joe Vinson that she was mugged by two black men and because he failed to obtain an alleged police video recording of the incident. We disagree.

To preserve a claim of ineffective assistance of counsel, a criminal defendant must make a motion for a new trial or request an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). Defendant's March 11, 2005, motion to remand for an evidentiary hearing to develop the record with respect to his ineffective assistance of counsel claim was denied. Therefore, this Court may review the issue; however, when reviewing an unpreserved claim of ineffective assistance of counsel, where an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Michigan Supreme Court rearticulated the standard for ineffective assistance of counsel in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The Court adopted the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland, supra* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland, supra* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant has not shown that defense counsel's performance was deficient. First, because defendant has produced absolutely no evidence that a video recording of the events exists, defendant's assertion that his counsel's performance was deficient because he did not secure a video recording of the events lacks merit. Second, we reject defendant's assertion that counsel's failure to produce Billy Joe Vinson at trial was not sound trial strategy. There is no evidence in the lower court record or trial transcript that establishes who Billy Joe Vinson is, or

what he would have said, thus the failure to call this witness can not be said to have been prejudicial to defendant. Absent a showing of prejudice, defendant cannot establish that, but for counsel's alleged error, the result of the proceeding would have been different. *Strickland, supra at* 694. Therefore, defendant has not proven he was deprived of the effective assistance of counsel.

Finally, defendant argues that the prosecution violated his right of due process by failing to produce the alleged police video of the end of the incident. We disagree. Defendant failed to preserve this issue below.

At a minimum, defendant must "raise the issue" in the trial court in order to preserve a constitutional claim of error. *People v Russel*, 266 Mich App 307, 314; 703 NW2d 107 (2005). There is no evidence in the lower court record or trial transcript that suggests defendant even requested the police video, let alone suggested that the fact it was not provided violated his due process right to a fair trial. Therefore the issue was not properly preserved. This Court reviews an unpreserved constitutional claim for plain error that affects defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "Defendant must show (1) the error must have occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant, rather than the Government who bears the burden of persuasion with respect to prejudice." *Carine*s, *supra* at 763 (internal citations omitted).

This Court summarized a defendant's right to obtain information from the prosecution in *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998). The Court stated:

> A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. *Giglio v United States,* 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence "may make the difference between conviction and acquittal." *United States v Bagley,* 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).
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> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros*, 866 F2d 1304, 1308 (CA11, 1989), cert den 493 US 932; 110 S Ct 322; 107 L Ed 2d 312 (1989). [*Lester, supra* at 280-282.]

The Court further stated:

> The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness. *Bagley*, supra at 676-677; *Giglio, supra*[, 405 US] 154. The court still must find the evidence material. *Id.; United States v Trujillo,* 136 F3d 1388, 1393 (CA10, 1998), cert den 525 US 833; 119 S Ct 87; 142 L Ed 2d 69 (1998). Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proce eding would have been different. *Bagley, supra* at 682; *People v Fink,* 456 Mich 449, 454; 574 NW2d 28 (1998). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley, supra* at 682. Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* [*v Wheatly,* 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995)]. In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *Bagley, supra* at 683. [*Lester, supra* at 282.]

Again, since defendant has failed to demonstrate that a video actually exists, he cannot demonstrate how the outcome of the proceedings would have been different.

Even assuming, however, that there was a video, and that it contained footage of everything defendant asserts, the video would only show the end of the fight when the police arrived on the scene; thus, the evidence is not material. Defendant was convicted for assaulting Hope and Raymond, and these assaults took place at the beginning of the incident, and before additional people became involved. In its findings of facts, the trial court stated, "there's no question in my mind that after [defendant hit Hope and Raymond], that several individuals jumped on the defendant and gave him a beating. There's no question in my mind about that." Thus, although the trial court determined defendant was beaten at some point in the evening, nevertheless, he found defendant guilty of felonious assault because he believed the testimony of Hope and Raymond, about the initial cause of the fight, was more credible than the testimony by defendant and Whelan. Therefore, the absence of the alleged police video in evidence, if one even existed, did not deny defendant due process of law, because it would not have affected the outcome of the proceedings.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood